

not the employer owns or controls such worksite(s)—without filing new labor condition application(s) for the area(s) of intended employment which would encompass such worksite(s).

(b) The following restrictions shall be fully satisfied by an employer which places H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) within areas of employment not listed on the employer's labor condition application(s):

(1) The employer has fully satisfied the requirements of §§ 655.730 through 655.734 of this part with regard to worksite(s) located within the area(s) of intended employment listed on the employer's labor condition application(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H-1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as the H-1B nonimmigrant(s).

(3) For every day of the H-1B nonimmigrant's(s') placement outside the LCA-listed area of employment, the employer shall pay such worker(s) the required wage (based on the prevailing wage at such worker's(s) permanent work site, or the employer's actual wage, whichever is higher) plus per diem and transportation expenses (for both workdays and non-workdays) at rate(s) no lower than the rate(s) prescribed for Federal Government employees on travel or temporary assignment, as set out in 41 CFR Part 301-7 and Ch. 301, App. A.

(4) The employer's placement(s) of H-1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety workdays within a three-year period, beginning on the first day on which the employer placed an H-1B nonimmigrant at any worksite within such area of employment. For purposes of this section, "workday" shall mean any day on which one or more H-1B nonimmigrants perform any work at any worksite(s) within the area of employment. For example, one "workday" would be counted for a day on which seven H-1B nonimmigrants worked at three worksites within one city, and one "workday" would be

counted for a day on which one H-1B nonimmigrant worked at one worksite within a city. The employer may rotate such workers into worksites within such area of employment or may maintain a constant work force. However, on the first day after the accumulation of 90 workdays, the employer shall not have any such H-1B nonimmigrant(s) at any worksite(s) within such area of employment not included on a certified LCA.

(c) At the accumulation of the 90 workdays described in paragraph (b)(4) of this section, the employer shall have ended its placement of all H-1B nonimmigrant(s) at any worksite(s) within the area of employment not listed on the labor condition application, *or* shall have filed and received a certified labor condition application for the area(s) of intended employment encompassing such worksite(s) and performed all actions required in connection with such filing(s) (*e.g.*, determination of the prevailing wage; notice to collective bargaining representative or on-site notice to workers).

(d) At any time during the 90-day period described in paragraph (b)(4) of this section, the employer may file a labor condition application for the area of intended employment encompassing such worksite(s), performing all actions required in connection with such labor condition application. Upon certification of such LCA, the employer's obligation to pay Federal per diem rates to the H-1B nonimmigrant(s) shall terminate. (However, *see* § 655.731(c)(7)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

§ 655.740 Labor condition application determinations.

(a) *Actions on labor condition applications submitted for filing.* Once a labor condition application has been received from an employer, a determination shall be made by the ETA regional Certifying Officer whether to certify the labor condition application or return it to the employer not certified.

(1) *Certification of labor condition application.* Where all items on Form ETA 9035 have been completed, the form is not obviously inaccurate, and it contains the signature of the employer or

its authorized agent or representative, the regional Certifying Officer shall certify the labor condition application unless it falls within one of the categories set forth in paragraph (a)(2) of this section. The Certifying Officer shall make a determination to certify or not certify the labor condition application within 7 working days of the date the application is received and date-stamped by the Department. If the labor condition application is certified, the regional Certifying Officer shall return a certified copy of the labor condition application to the employer or the employer's authorized agent or representative. The employer shall file the certified labor condition application with the appropriate INS office in the manner prescribed by INS. The INS shall determine whether each occupational classification named in the certified labor condition application is a specialty occupation or is a fashion model of distinguished merit and ability.

(2) *Determinations not to certify labor condition applications.* ETA shall not certify a labor condition application and shall return such application to the employer or the employer's authorized agent or representative, when either or both of the following two conditions exists:

(i) When the Form ETA 9035 is not properly completed. Examples of a Form ETA 9035 which is not properly completed include instances where the employer has failed to check all the necessary boxes; or where the employer has failed to state the occupational classification, number of non-immigrants sought, wage rate, period of intended employment, place of intended employment, or prevailing wage and its source; or where the application does not contain the signature of the employer or the employer's authorized agent or representative.

(ii) When the Form ETA 9035 contains obvious inaccuracies. An obvious inaccuracy will be found if the employer files an application in error—e.g., where the Administrator, Wage and Hour Division, after notice and opportunity for a hearing pursuant to subpart I of this part, has notified ETA in writing that the employer has been disqualified from employing H-1B non-

immigrants under section 212(n)(2) of the INA. Examples of other obvious inaccuracies include stating a wage rate below the FLSA minimum wage, submitting a labor condition application earlier than six months before the beginning date of the period of intended employment, identifying multiple occupations on a single labor condition application, identifying places of employment within the jurisdiction of more than one ETA regional office on a single labor condition application, identifying a wage which is below the prevailing wage listed on the LCA, or identifying a wage range where the bottom of such wage range is lower than the prevailing wage listed on the LCA.

(3) *Correction and resubmission of labor condition application.* If the labor condition application is not certified pursuant to paragraph (a)(2) (i) or (ii) of this section, ETA shall return it to the employer, or the employer's authorized agent or representative, explaining the reasons for such return without certification. The employer may immediately submit a corrected application to ETA. A "resubmitted" or "corrected" labor condition application shall be treated as a new application by the regional office (i.e., on a "first come, first served" basis) *except that* if the labor condition application is not certified pursuant to paragraph (a)(2)(ii) of this section because of notification by the Administrator of the employer's disqualification, such action shall be the final decision of the Secretary and no application shall be resubmitted by the employer.

(b) *Challenges to labor condition applications.* ETA shall not consider information contesting a labor condition application received by ETA prior to the determination on the application. Such information shall not be made part of ETA's administrative record on the application, but shall be referred to ESA to be processed as a complaint pursuant to subpart I of this part, and, if such application is certified by ETA, the complaint will be handled by ESA under subpart I of this part.

(c) *Truthfulness and adequacy of information.* DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application.

The burden of proof is on the employer to establish the truthfulness of the information contained on the labor condition application.

§655.750 Validity period of the labor condition application.

(a) *Validity of certified labor condition applications.* A labor condition application which has been certified pursuant to the provisions of §655.740 of this part shall be valid for the period of employment indicated on Form ETA 9035 by the authorized DOL official; however, in no event shall the validity period of a labor condition application begin before the application is certified or exceed three years. Where the labor condition application contains multiple periods of intended employment, the validity period shall extend to the latest date indicated or three years, whichever comes first.

(b) *Withdrawal of certified labor condition applications.* (1) An employer who has filed a labor condition application which has been certified pursuant to §655.740 of this part may withdraw such labor condition application at any time before the expiration of the validity period of the application, provided that:

(i) H-1B nonimmigrants are not employed at the place of employment pursuant to the labor condition application; and

(ii) The Administrator has not commenced an investigation of the particular application. Any such request for withdrawal shall be null and void; and the employer shall remain bound by the labor condition application until the enforcement proceeding is completed, at which time the application may be withdrawn.

(2) Requests for withdrawals shall be in writing and shall be directed to the regional ETA Certifying Officer.

(3) An employer shall comply with the "required wage rate" and "prevailing working conditions" statements of its labor condition application required under §§655.731 and 655.732 of this part, respectively, even if such application is withdrawn, at any time H-1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA.

(4) An employer's obligation to comply with the "no strike or lockout" and "notice" statements of its labor condition application (required under §§655.733 and 655.734 of this part, respectively), shall remain in effect and the employer shall remain subject to investigation and sanctions for misrepresentation on these statements even if such application is withdrawn, regardless of whether H-1B nonimmigrants are actually employed, unless the application is superseded by a subsequent application which is certified by ETA.

(5) Only for the purpose of assuring the labor standards protections afforded under the H-1B program, where an employer files a petition with INS under the H-1B classification pursuant to a certified LCA that had been withdrawn by the employer, such petition filing binds the employer to all obligations under the withdrawn LCA immediately upon receipt of such petition by INS.

(c) *Invalidation or suspension of a labor condition application.* (1) Invalidation of a labor condition application shall result from enforcement action(s) by the Administrator, Wage and Hour Division, under subpart I of this part—e.g., a final determination finding the employer's failure to meet the application's condition regarding strike or lockout; or the employer's willful failure to meet the wage and working conditions provisions of the application; or the employer's substantial failure to meet the notice of specification requirements of the application; see §§655.734 and 655.760 of this part; or the misrepresentation of a material fact in an application. Upon notice by the Administrator of the employer's disqualification, ETA shall invalidate the application and notify the employer, or the employer's authorized agent or representative. ETA shall notify the employer in writing of the reason(s) that the application is invalidated. When a labor condition application is invalidated, such action shall be the final decision of the Secretary.

(2) Suspension of a labor condition application may result from a discovery by ETA that it made an error in certifying the application because such application is incomplete, contains one or more obvious inaccuracies, or has